IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 632 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

NARSHI @ NARESH POPATBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 632 of 1993

MR SHAURIN A. SHAH with MR KR RAVAL for Petitioner No. 1

MR HH PATEL, APP for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 07/02/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

1. The appellant has filed this appeal u/S. 374 (2) of the Code of Criminal Procedure (for short 'Cr.P.C.') challenging the judgment and order of conviction and sentence passed by the Ld. Sessions Judge, Bhavnagar dated 30/4/1993 in Sessions Case No. 113/1992. Vide said judgment the appellant has been convicted for an offence made punishable under Section 302 of the Indian Penal Code (for short 'IPC') and he has been sentenced to suffer imprisonment for life.

2. The prosecution's case in nutshell can be stated as under :-

2.1. The complainant of this case - Mukeshkumar Bachubhai had three brothers, namely Dhirubhai Bachubhai, Pravinbhai Bachubhai and Nanubhai Bachubhai. Dhirubhai Bachubhai is the deceased. Pravinbhai Bachubhai was married to Bharatiben for whom the present appellant is alleged to have developed infatuation. On the day prior to the present incident at about 9.00 p.m. the appellant in drunken condition had gone to the house of Pravinbhai and finding that Bharatiben was all alone in the house, he caught hold of her hand with a view to fulfill his dirty desire. Bharatiben resented this and she shouted for help. The deceased immediately went upstairs where Bharatiben was staying and he scolded the appellant. Not only that he also physically belaboured him and he was driven out of the house. On the next day i.e. 27/2/1992 in the afternoon at about 2.00 p.m. the deceased went to answer the call of nature near a pipal tree situated in the compound of office of the P.W.D. The appellant with a view to take revenge followed him and assaulted him from the back side with a knife. It appears that he inflicted knife blow on the left hand side slightly towards back of the chest. On receiving the injury deceased got scared. It also appears that the complainant who was in the employment of the P.W.D. saw the incident and rushed to help his brother. On seeing the complainant, appellant immediately escaped from there. One Jashubhai Nathabhai, who owned a Pan shop outside the compound of P.W.D. office situated on Panwadi road also came there. Both the complainant as well as Jashubhai went out on the road to fetch a rickshaw. While they were in search of rickshaw, the deceased could manage to reach the gate of the P.W.D. office compound. At the gate he was noticed by one Bharatsinh who immediately stopped one rickshaw and in that rickshaw he took the injured to the hospital. At the hospital, it appears that some initial treatment was

given, but shortly thereafter the deceased seems to have expired. The complainant alongwith his brother Pravinbhai and Jashubhai alias Jashvantbhai followed the deceased and Bharatsinh in another rickshaw and they also reached hospital within about 10 minutes. At the hospital, the police present on duty interrogated Bharatsinh and also the complainant and recorded the FIR on that basis. The information was thereafter sent to the "A" Division Police Station, Bhavnagar and Kaushikkumar Rambhai Patel, the Police Inspector who on that day was in charge of the said police station, immediately went to the hospital and took charge of the investigation. He arranged to get the inquest panchnama drawn and also sent the body for post mortem around 4.00 p.m. After the post mortem was completed the further investigation was carried out, during which statements of various persons conversant with the facts of the case, came to be recorded. The panchnama of the scene of offence was also drawn. In the meanwhile police received information that the appellant was to go to the bus stand and hence the Police Inspector and his staff members went to the bus stand and on locating the appellant, they immediately apprehended him. Subsequently the panchnama of his person was drawn and the blood stained clothes put on by him at the time of incident as well as the knife used for committing the offence were seized from his person. The clothes put on by the deceased also came to be seized by the police and all these blood stained articles were sent to the Forensic Science Laboratory for examination and in due course, report from the Forensic Science Laboratory was received by the Investigating Officer.

2.2. On completion of the investigation, the chargesheet came to be filed against the appellant for offence u/S. 302 of the IPC in the Court of the Ld. Judicial Magistrate First Class at Bhavnagar, who in turn committed the case to the Court of Sessions as the offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

3. At the trial, the Ld. Sessions Judge, Bhavnagar framed charge against the appellant for offence u/S. 302 of the IPC as well as offence punishable u/S. 135 of the Bombay Police Act at Exh. 4 on 26/3/1993. The appellant not pleaded guilty to the charge and claimed to be tried.

4. At the trial, the prosecution examined 14 witnesses in support of its case. The prosecution also placed reliance on certain documentary evidence such as the complaint at Exh. 16, the inquest panchnama at Exh.

7, the post mortem notes at Exh. 25, report of the Serologist Nos. 1 and 2 at Exhs. 13 and 14, etc. On completion of the recording of the oral evidence of the witnesses, in further statement u/S. 313 of the Cr.P.C. the appellant was put all the circumstances appearing against him in the evidence to enable him to render explanation if he so desired. The statement, however, shows that no specific case has been pleaded by the appellant, but his defence appears to be that of general denial.

5. At the end of the trial, the Ld. Sessions Judge came to the conclusion that the prosecution had been able to prove beyond reasonable doubt that appellant on 27/2/1992 at about 2.00 p.m. gave knife blow to deceased Dhirubhai Bachubhai with an intention to commit his murder. He, therefore, found him guilty for an offence made punishable u/S. 302 of the IPC and as a result thereof, he sentenced him to suffer imprisonment for life.

6. At the hearing of this appeal Mr. Shaurin A. Shah, learned counsel appearing for the appellant contended before us that the Ld. Sessions Judge, Bhavnagar committed grave error in convicting the appellant for offence u/S. 302 of the IPC. He submitted that evidence that has come on record of this case is very weak and it clearly shows that the prosecution has failed to establish its case against the appellant beyond any reasonable doubt and the Ld. Sessions Judge ought to have given to the appellant benefit of doubt. He has further contended that the so called eye witnesses produced by the prosecution at the time of trial in reality are not the eye witnesses, but they have been falsely got up by the police with a view to get support to the prosecution case. He has further submitted that the investigation in this case is not fair in as much as the very first information which came to be recorded in the form of complaint and which was based on the interrogation of Bharatsinh made by the police at the hospital, is not coming forth and instead the complaint which came to be given by Mukeshkumar Bachubhai at the police station at about 6.00 p.m.; not only that but is posed to be FIR, though it was recorded at 6.00 p.m. as stated by the witness himself, the prosecution was trying to show it came to be recorded at the hospital itself around 3.15 p.m. According to Mr. Shah, the police has completely manipulated this case to secure the conviction of the appellant by any means. Lastly he has submitted that this appeal deserves to be accepted and the appellant is required to be acquitted of the charge

levelled against him.

6.1. As against that, Mr. H.H. Patel, Ld. APP appearing for the respondent - State has submitted that looking to the evidence of the eye witnesses and the other surrounding circumstances appearing in this case, it is very clear that it is the appellant alone who has committed this crime and he has been rightly convicted by the Ld. Sessions Judge for committing an offence u/S. 302 of the IPC. According to Mr. Patel defence has not been able to discredit the prosecution evidence and the same has remained totally unshaken and acceptable. In his opinion, the Ld. Sessions Judge has not committed any error as he has based the conviction on the strength of such evidence. Lastly, he has submitted that the appeal has no merit and it deserves to be dismissed.

7. Both the learned counsels have taken us through the entire record of the case and have placed reliance on the oral as well as documentary evidence in support of their rival contentions. We have also carefully scrutinised the entire evidence with a view to reappreciate it to enable us to render this judgment.

8. The prosecution, in order to prove that the deceased had died homicidal death, has relied on the evidence of Dr. Yasmin Alladin, P.W. 8 Exh. 24. Evidence of this witness shows that at the relevant time he was working as Medical Officer in the hospital at Bhavnagar. On 27/2/1992 at about 4.30 p.m. he received the dead body of Dhirubhai for its autopsy. He commenced the post mortem examination at 4.40 p.m. and completed it at 5.40 p.m. on 27/2/1992. During the post mortem examination the witness noticed following injuries, namely (1) stitch wound of 3 cm length over left posterior ancillary line, 6 cm. away from left axilla, oblique in direction (2) two stitches measurement of 4" x 4" over this part (injury no.1). He also found internal injuries, namely, (1) incised wound of 3 cm. between 3rd and 4th rib intercostal space posterior lateral aspect oblique in direction, (2) left lung pleura torn on hamoterax, (3) right lung congested, (4) left lung congested - left lung torn, tear through and through the lung. Pericardia - tear anterio lateral part, (5) heart left chamber - tear off 1" x 1", direction vertical ante, right chamber - having very little blood.

8.1. In the opinion of this witness, the cause of death was shock due to penetrating injury directly over left lung and heart. He has also stated that the injuries suffered by Dhirubhai was sufficient to cause his death.

In his opinion, the injury could be caused by sharp instrument. In the cross-examination he has stated that the injuries would affect the blood circulation of the patient and he would find difficulty for respiration. He has denied the suggestion of the defence that such patient would not be able to walk the distance of even 10 paces and that his voice would become very low while speaking and that the patient would become absolutely dull. He has further stated that he would not be in a position to say with sure as to what distance such patient would be able to cover on foot. He has also denied the suggestion put by the defence that a person who has received such injuries would become unconscious within matter of seconds. He has further stated that he would not be able to say in what time the patient would become unconscious. He has admitted that person who had received such injuries would not be in a position to walk a distance of 100 meters.

8.2. Looking to the evidence of this witness, it is very clear that he had died due to injury received by him which had caused damage to his very vital organs of the body, namely left lung as well as heart. In our opinion, therefore, there is no manner of doubt that Dhirubhai had died homicidal death and the finding given by the Ld. trial Judge on that count is absolutely proper.

9. With a view to establish that it was the appellant who was author of these injuries, prosecution has examined Mukeshkumar Bachubhai P.W. 1 Exh. 15. According to this witness, he is a resident of village Bhavnagar and at the relevant time he stayed in an area called Panwadi. He was working with the Public Works Department. He had three other brothers, namely Dhirubhai Bachubhai, Pravinbhai Bachubhai and Nanubhai Bachubhai and all the four brothers stayed together. He has stated that the incident in question had taken place at about 2.00 p.m. on 27/2/1992. According to him, at that time Dhirubhai Bachubhai, his brother was answering the call of nature near a pipal tree and at that time the present appellant came there and he gave blows with knife on the back of the deceased Dhirubhai as well as on the left side of the body. After inflicting the blows the appellant ran away. Subsequently Pravinbhai, another brother of the deceased, complainant and one Jashubhai Nathabhai came there. They with a view to remove the injured to the hospital, went outside the compound gate of the office of the P.W.D. in search of a rickshaw. At the gate they met Bharatsinh, who immediately got one rickshaw and made the deceased sit in it. Bharatsinh took the deceased in the hospital for treatment. He was

followed by the other three persons. At the hospital Dhirubhai expired during treatment. He has further stated that on the previous night appellant had gone to the house of complainant's sister-in-law Bharatiben, who stayed in the upper part of the house. The appellant caught hold of hand of Bharatiben, whereupon the deceased scolded him. He has further stated that it was he who had given complaint in the police which is at Exh. 16 on record. He has further stated that on the day of incident in the morning also there was exchange of words between the appellant and the deceased. In the cross-examination by the defence, he has stated that at about 9.00 a.m. of that day, he had gone to the office of P.W.D. for doing labour work. He was at the P.W.D. premises and put 400 bags in the godown. He worked for about one and half hours and became free at about 11.00 a.m. Thereafter he went home and then came back to factory. He has denied the suggestion put by the defence that on the day of incident he was not working in the P.W.D. and he had not received any remuneration for the same. He has further stated that he came back to the P.W.D. premises at about 12.30 afternoon and first he went to the Shankar Pan Centre and thereafter he started walking towards P.W.D. office from Shankar Pan House. After covering distance of about 5 to 6 paces, he could see the entire incident. This witness has been put various questions regarding the topography of the area with a view to show that it was not possible for him to notice the incident from the place where he was standing after having pan. He has also denied the suggestion put by the defence that from the place where he was standing at the time of incident, he could not have seen it. He has further reiterated the fact that he had seen the incident and he had seen the appellant giving blow to the deceased. According to him, one blow was given on the side of the body, whereas other blow was delivered on the stomach. He has also stated that since he had caught his brother his own clothes had got blood stained. He has further stated that when he reached the hospital, about 2 to 3 policemen were already present there. They were standing near the cot of the deceased. They immediately interrogated this witness and according to him, the police recorded his complaint. He, however, in the next breath states that his complaint was recorded at the police station at about 6.00 p.m. According to this witness, on the previous day there was exchange of words between the deceased and the appellant and it was also true that on the previous evening the deceased had beaten the appellant. He has further stated that he had not noticed the appellant in the hospital taking treatment for the injuries received by him.

9.1. The next witness is Bharatsinh Jamsinh P.W.5 Exh. 21. He is the person who had taken the deceased in injured condition to the hospital in a rickshaw. On that day he was sitting near the Pan Galla when he saw a person coming from Panwadi road. He was staggering and he was in bleeding condition. On inquiry this witness was informed by the injured that it was Narsi Popat i.e. the appellant who had given him knife blow. At the hospital he arranged to get the treatment for injured. He has stated that in the meanwhile two brothers of injured came there. He has further stated that during the treatment the injured died at the hospital. In the cross examination he says that he had stated before the police that in the afternoon he had gone to bazar and he was returning from there on bicycle. He has further stated that he had also told the police that he saw one person coming running from the P.W.D. compound. He has denied the suggestion that the injured had not given any name to him of the assailant. He has also stated that while removing the injured to the hospital in a rickshaw, his clothes did not get blood stained. He has also denied that during interrogation by the police at the hospital he had not given the name of the assailant and that at the hospital the Inspector of Police had interrogated him. He has however, admitted that a police case has been filed against him and he has been placed under suspension, he being a Police Constable. He has denied the suggestion of the defence that when he met the deceased he was not in a position to speak and that he had not given the name of the assailant.

9.2. The evidence of Jashvantbhai Nathabhai P.W. 6 Exh. 22 and Pravinbhai Bachubhai P.W.11 Exh. 31 is more or less the same i.e. as per the story given by the earlier witnesses and there is, therefore, no need to repeat in detail the same here. Both the witnesses are, however, very clear that it was the appellant who had caused the injuries to deceased Dhirubhai while he was answering the call of nature in the compound of P.W.D. office near pipal tree. The defence has cross-examined these witnesses on the line of earlier witnesses.

9.3. It may be noted here that the appellant had also received injuries for which he had taken treatment at the hospital. Dr. Ganibhai Kasambhai P.W.9 Exh. 26, the Medical Officer at Bhavnagar hospital had examined appellant at about 9.30 p.m. on 27/2/1992, who was brought there by police with Yadi. During treatment he had found that appellant had received injuries on the left hand side. For this injury the appellant was given

treatment and necessary medical certificate issued by the hospital has been produced by this witness at Exh. 27.

9.4. The Investigating Officer Kaushikkumar Rambhai Patel, P.W. 13 Exh. 34 has stated in his examination-in-chief that on the relevant day he was incharge of the "A" Division Police Station at Bhavnagar and on receiving information with regard to deceased, he immediately rushed to the hospital. At the hospital he found that the deceased had died and, therefore, he arranged to get the inquest panchnama drawn and he thereafter sent the body to the Medical Officer for carrying out the post mortem examination. He has stated that on receiving prior information he alongwith the police party went to the bus stand and on seeing the appellant they immediately apprehended him. During the search of his person at the police station, knife was recovered from his pocket and he also produced the blood stained clothes before the police. In the cross-examination the defence has tried to make an endeavour to show that the investigation carried out by this officer was a tainted one in as much as on certain aspects clear manipulation seemed to have been done. He has stated that the FIR of the complainant Mukeshkumar was recorded only at 3.15 p.m. in the hospital and not around 6.00 O'clock in the evening.

10. Considering the aforesaid oral evidence on record and particularly the evidence of witness Bharatsinh, it appears that at the hospital he was extensively interrogated by the police and his complaint came to be recorded and his signature also came to be taken thereon. If this is true, then complaint should be that of Bharatsinh. However, it is the prosecution's case that the complaint was recorded shortly after the death of deceased i.e. around 3.15 p.m. and that too of Mukeshkumar. We fail to understand why the second complaint of Mukeshkumar came to be recorded first at 3.15 p.m. and thereafter at 6.00 p.m. by the police. Slightly diverting from this issue, if we see the topography of the place at which the offence has taken place and then consider the evidence of eye witness Mukeshkumar, it clearly emerges that he could not have possibly seen the incident from the place where he was standing at the time of offence took place. The prosecution has also produced map of scene of offence and perusal of the map shows that the view of this witness could have been obstructed by the superstructures, which partly screen the lower part trunk of pipal tree from the view. If incident is alleged to have taken place near the pipal tree, it is not possible that this witness

could have seen this incident. Apart from that, it is also very improbable that when his work was over at about 11.00 to 11.30 a.m. why he should loiter there without any reason. However, the investigating agency has not only posed this person as an eye witness, but also he has been made complainant in this case giving go bye to the complaint which came to be recorded on the basis of interrogation of Bharatsinh at the hospital at 3.15 p.m. Such manipulation creates grave doubt about the veracity of the evidence of other witnesses also. Reverting back to the evidence of complainant Mukeshkumar, in the cross-examination he has stated that after he reached hospital at first he was interrogated by the police. At that time Bharatsinh was present. Thereafter, the police interrogated Bharatsinh and on that basis complaint was recorded. If this part of evidence is read in light of the evidence of P.W. Jashvantbhai Nathabhai wherein he has stated that when they went to the hospital, the interrogation of Bharatsinh was going on. Thereafter, the police had obtained his signature, it becomes very clear that the police recorded the complaint of Bharatsinh at the hospital around 3.15 p.m. The say of the complainant that is concerned, was recorded at about 6.00 p.m. at the police station and contradictory version given by the P.I. Kaushikkumar that the complaint of Mukeshkumar was recorded at the hospital at 3.15 p.m. creates a grave doubt regarding the version given by the prosecution that it was Mukeshkumar who had given the complaint and that too at 3.15 p.m. in the hospital. We, therefore, have the reason to believe that initially the police had recorded complaint of Bharatsinh, but with a view to manipulate evidence against the appellant, that complaint was destroyed and another complaint in the name of Mukeshkumar came to be recorded at 6.00 p.m. in the police station. In our opinion, therefore, evidence of Mukeshkumar and Bharatsinh cannot be relied on.

11. If the evidence of other witnesses examined by the prosecution as eye witnesses in this case, namely Jashvantbhai Nathabhai and Pravinbhai Bachubhai is concerned, we feel that they are chance witnesses and they have been falsely posed as eye witnesses by the prosecution to support its case. P.W. Jashvantbhai has his Pan Galla shop outside the compound of the P.W.D. office. His say is that at the time when the incident took place he had gone to answer the call of nature and, therefore, he had witnessed the incident. That is a strange coincident that deceased as well as Jashvantbhai who developed the desire to answer the call of nature one and at the same time. Moreover, Jashvantbhai is an

outsider and he has nothing to do with P.W.D. office. He, therefore, would not venture to enter the compound of P.W.D. office and to ease himself. Apart from this, according to him, while he was approaching the gate of the compound he heard the shout of the deceased and he turned back and he saw the appellant inflicting knife blows on him. It is very unnatural that before any knife blow is inflicted and that too from the back side of the deceased without the assailant being noticed by the deceased, the deceased would have any reason to let-off a shout. It is very natural that only when the blows are inflicted, out of pain and fear the deceased would shout for help. This witness does not tell the truth that when he heard the shout, he turned back and saw the appellant inflicting blows with knife on the deceased. His evidence, therefore, cannot be relied on to base conviction of the appellant.

11.1. So far witness Pravinbhai is concerned, he states that on hearing about previous night's incident, he had decided to scold the appellant and in the next morning he started searching for him but did not find him. He thereafter went for his service. He does not say that at which place he was serving and with whom. However, he states that at about quarter to two, he saw the appellant entering in the compound of P.W.D. office and, therefore, he also followed him with a view to scold him. At that time he saw the appellant running and giving knife blows to his brother Dhirubhai. In the cross-examination he has stated that he had seen the incident from the gate. Again if the evidence of these witnesses scrutinised closely, it shows that he is also a chance witness. It is very strange that all the three brothers would be there in the compound of P.W.D. or near thereabout at one and the same time. It is also very strange that except these two brothers and their friend Jashvantbhai, no other person has seen the incident. Coupled with this, even assuming he was there at the time when the incident took place, according to his own evidence, he was standing at the gate and as discussed earlier person standing at the gate would not be able to witness what transpired near the pipal tree inside the compound.

11.2. These witnesses, therefore, are not reliable and conviction cannot be based on the evidence of such witnesses. Considering the totality of the facts and circumstances, which we have discussed above, we hold that the prosecution has not come with clean hands and the benefit thereof should go to the appellant. In other words, we hold that the prosecution has not been able to

prove its case beyond any reasonable doubt and the appellant is entitled to be acquitted by giving him benefit of doubt.

12. In the result, the appeal succeeds and it is hereby allowed. The appellant is directed to be released from the prison forthwith unless his presence is required for any other purpose.

Muddamal articles to be disposed of in terms of the directions given by the Ld. trial Judge in the impugned judgment.

[K.R. VYAS, J.]

[AKSHAY H. MEHTA,J.]

* Pansala.